

for The Defense

Volume 3, Issue 5 -- May 1993

The Training Newsletter for the
Maricopa County Public Defender's Office

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Shattering Some Myths About The Interview Process

By Dan Raynak

Myth #1: The State Controls The Interview Process

Nothing could be further from the truth than the idea that the state controls the interview process. Case law specifically states that neither side may control the interview/ investigative process, and that witnesses belong to neither party. In *Mota v. Buchanan*, 26 Ariz. App. 246, 249, 547 P.2d 517 (1976), the Court of Appeals held that "although a witness may refuse to be interviewed by defense counsel, the prosecution has no right to interfere with or prevent a defendant's access to a witness, absent an overriding interest in security." Citing *Gregory v. United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966); *Lewis v. Court of Common*

Pleas of Lebanon County, 436 Pa. 296, 260 A.2d 184 (1969); *Martinez v. State*, 496 P.2d 416 (Okla. Cr. 1972); *People v. Jackson*, 116 Ill. App. 2nd 304, 253 M.E. 2d 527 (1969); *United States v. King*, 368 F.Supp. 130 (D.C.F.La 1973) and *United States v. Scott*, 518 F.2d 261 (6th Cir. 1975).

In *State v. Draper*, 158 Ariz. 315, 318, 762 P.2d 602 (1988), the Court of Appeals held that "there is a strong similarity between the prosecution's failure to disclose exculpatory evidence and the prosecution's foreclosure of the defendant's right to attempt to discover exculpatory evidence himself." *Draper* notes that "while a witness does not have to talk to defense counsel, it is improper for the state to interfere with the right of the defense to attempt to talk to witnesses." 158 Ariz. 315, 318.

The *Draper* court also cites *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) for the proposition that:

"The gist of a *Mendez-Rodriguez* violation lies in the interference with the opportunity to formulate a defense. Conduct by the government which prevents a defendant from interviewing potential witnesses and making an independent judgment on which witnesses should be called deprives the defendant of the fundamental right to plan and present a defense to criminal charges." 158 Ariz. 315, 318.

See also, *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974); *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), cert. denied 444 U.S. 1034, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *State v. Weiss*, 101 Ariz. 315, 419 P.2d 342 (1966); *Mota v. Buchanan*, 26 Ariz. App. 246, 547 P.2d 517 (1976); and *State v. Chaney*, 5 Ariz. App. 530, 428 P.2d 104 (1967).

The state usually includes in its Notice of Discovery a statement that all interviews are to be arranged by the prosecuting attorney's office. This statement is not grounded in the law, and has no legal effect. In *Draper*, the Arizona Court of Appeals held that:

"To forbid a defendant the right to attempt to interview witnesses undermines the adversary system and threatens the foundation of our system of justice. Such a condition violates the right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and Article 2, Sec. 4 of the Arizona Constitution, and the right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States and Article 2, Sec. 24 of the Arizona Constitution. Even if the condition were not violative of these constitutional rights, it nonetheless is against public policy because it corrupts the truth-finding process.

(cont. on pg. 2)



We do not suggest that a guilty plea cannot be entered unless and until defense counsel interviews the witnesses in the case, a failure to conduct such interviews will frequently constitute ineffective assistance of counsel. *Id.*

We have no hesitancy in holding that, except in those most unusual circumstances, it offends basic notions of minimal competence of representation for defense counsel to fail to interview any state witness prior to a major felony trial." *Id.*, citing *State v. Radjenovich*, 138 Ariz. 270, 674 P.2d 333 (1983).

The *Draper* court notes further that "defense counsel's role as an investigator is not confined to those cases which actually go to trial." 158 Ariz. 315, 318.

Myth #2: The State May Determine Who Sets Up The Interviews Of The Listed Witnesses In The Case

Not so. Under *Draper*, and a long line of cases, it is apparent that witnesses to a case do not belong to either party. A typical situation is one in which the state proposes plea offer, with a deadline for acceptance. The state then also wants to set up the interviews on this particular, but does not provide a deadline when the interviews will be conducted. Few, if any, of the interviews are conducted prior to the deadline passing for your client to accept the plea agreement. In effect, defense counsel has allowed the state to control the investigative process. The accused is without the benefit of having the matter fully investigated prior to determining whether she should enter into a plea agreement.

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

In *Draper*, the court held that:

"To permit the prosecutor to preclude the defense from interviewing witnesses before the defendant decides whether to enter a plea of guilty would, in many cases, guarantee that counsel was ineffective. Even if such a condition were not so egregious as to run afoul of the state and federal constitutions, we would, because this practice holds so strong a potential for subverting the truth-finding process, condemn it as contrary to public policy." *Id.* at 319 citing *Ethington*, 121 Ariz. 572, 592 P.2d 768.

Draper notes that "the protection of these rights is critical, particularly in a system where mandatory sentencing bestows a strong advantage on the state in the plea bargaining process." *Id.*

Not only may the prosecution not control the interview process by insisting they set up the interviews, but, they may not tell witnesses that they should not speak to defense counsel. The prosecution does have the right to inform witnesses that the state can make itself available for an interview, should that witness chose to have a member of the prosecution present. However, the state may not order, suggest or attempt to coerce any witness into not speaking to defense counsel, or a representative from defense counsel's office, without the state being present. That choice is to be made by the witness, and any attempt by the state to interfere with the defendant's access to the witness is a violation of Rule 15 (providing a variety of sanctions including precluding that witness from testifying at trial).

Myth #3: It Is In The Best Interests Of My Client To Have The State Set Up The Interviews So As To Not Upset The Prosecutor On The Case

Very often the state's investigation is completed at the time that your client is indicted, or set for a preliminary hearing. Therefore, defense counsel must play catch-up.

While some prosecutors are offended by the notion that the defense attorney would want to investigate the case, most recognize the accused's need to fully investigate in order to prepare the case for trial. The state has an interest in having convictions upheld on appeal, not reversed due to ineffective assistance of counsel. If the state's case is strong, there is no harm in having the defense investigate the case.

Defense counsel may only bargain from a position of strength if she is fully informed and has had the opportunity to investigate the case. The best plea bargains are achieved after the defense has an opportunity to investigate the case, and in many instances, uncover exculpatory evidence. Negotiations are then on a more equitable level, and often result in a better disposition for the client.

(cont. on pg. 3)

Myth #4: I Really Don't Have Any Control Over The Interview Process, And I Have No Alternatives Should The Alleged Victim Refuse To Be Interviewed

All witnesses listed by the state are subject to being interviewed or deposed by defense counsel, with the exception of those who fall under the Victims' Bill of Rights. Even witnesses who are considered victims as provided in the Victims' Bill of Rights may be interviewed. These witnesses may consent to or decline an interview. The first step is to write a letter to the prosecutor asking the prosecution to ask the alleged victim(s) whether he (they) will consent to an interview. If the answer is yes, the interview should be conducted as quickly as possible. As a courtesy, counsel may ask the state to set up the interview; however, if there is any delay, then defense counsel may consider scheduling and conducting the interview with the victim directly.

The state must disclose whether the alleged victim has any prior felony convictions or any misdemeanor convictions involving dishonesty, false statement, or moral turpitude. To ensure that this information is provided, part of the letter requesting an interview with the alleged victim should also include a request for this material. If the information is not received in a timely manner, then a Motion for Discovery citing the specific information being sought should be filed. The motion should be filed early in the discovery process to avoid delay. The letter should also request an avowal that the alleged victim is available to testify at trial. Should the prosecution fail to make the avowal, you may then consider having the court order the state to make that avowal on the record at the next court appearance.

Other information that the defense may seek from the state regarding the alleged victim, depending on the nature of the case involved, includes medical, psychiatric and psychological records, or any other relevant information which may be used at trial. For instance, if the state alleges the defendant caused serious physical injury to the victim, then medical records related to those injuries should be provided to the defense in advance of the trial setting. If there is evidence the alleged victim may have been under the influence of alcohol or drugs, that information should be turned over to the defense. This information may be exculpatory pursuant to *Brady v. Maryland*, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), and often it bears directly on the merits of the issues argued to the jury. In *State v. Roper*, 113 Ariz. Adv. Rep. 11 (filed May 18, 1992, mandate issued October 2, 1992) the Court of Appeals held that while a victim may refuse to make available to the defense their medical records:

"The defendant's due process right to a fundamentally fair trial and to present the defense of self-defense overcomes the statutory physician-patient privilege on the facts as presented here, just as a due process right overcomes the Victims' Bill of Rights on these facts." 113 Ariz. Adv. Rep. 11, 15.

The *Roper* court went on to note that while recognizing that the Victims' Bill of Rights is a shield for victims of crimes, "The amendment should not be a sword in the hands of victims to thwart the defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves

from their constitutional duty to afford a criminal defendant a fair trial." *Id.* at 16.

The state may not make the claim that the victim's medical records are not within its possession or control when they have access to the alleged victim, nor can the victim pick and choose what potentially exculpatory evidence to disclose. The accused's fundamental right to a fair trial overrides any Victims' Bill of Rights considerations.

The *Roper* court also stated that:

"[A]ny restrictions on defendant's access to information essential to preparation for effective, reasonable cross-examination or impeachment of the victim in this case imposed pursuant to the Victims' Bill of Rights must be proportionate to the interests of protecting the victim as balanced against the defendant's due process right to a fundamentally fair trial. A defendant must be afforded an opportunity to effectively cross-examine or impeach the victim, and she must be allowed to cross-examine even on matters that may be potentially revealing, embarrassing or prejudicial to the victim." *Id.* at 15-16.

The *Roper* court also wrote that "the right to confront witnesses means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to effectively cross-examine witnesses". *Id.*, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis*, 415 U.S. at 315). The court may insist that the inspection of medical records be done in-camera; however, these records, if relevant, must be made available to the defense in advance of trial.

Myth #5: I Have No Recourse Should A Witness Refuse To Be Interviewed

Rule 15.3(a) provides the criteria for requesting that a person's deposition be taken. The person must have testimony relevant to the case, and that individual must refuse to voluntarily cooperate in the interview process. Note, however, that an alleged victim may not be deposed under Rule 15.3, and may simply refuse to voluntarily cooperate in the interview process.

Often police officers listed as state's witnesses will refuse to return phone calls, or say that the prosecuting agency must set up the interviews. This provides the grounds for requesting a deposition pursuant to Rule 15.3(a).

In *State ex. rel. McDougall v. Municipal Court of City of Phoenix Court of Appeals*, 155 Ariz. 186, 190, 745 P.2d 634 (1987), the court held that "[a] witness is uncooperative when he attache[s] (sic) such conditions to an interview that it makes the situation untenable for defense counsel to discover needed material."

However, "a witness is not uncooperative simply because he places reasonable conditions on the interview. To be deemed uncooperative, the conditions must tend to frustrate discovery." *Id.* If a police officer refuses to return defense counsel's calls, she is frustrating the discovery process. No witness has the right to refuse to talk to defense counsel and later claim that she was being cooperative.

(cont. on pg. 4)

Another situation that arises is when the witness involved, often a police officer, says that he insists the prosecutor set up the interview. There is no case law allowing the witness to demand who should set up the interview. In *Kirkendall v. Fisher*, 27 Ariz. App. 210, 212, 553 P.2d 243 (1976), the court held that "where the witness attaches such conditions to an interview that it makes the situation untenable for defense counsel to discover needed material, the witness is being uncooperative within the meaning of the rule." 27 Ariz. App. at 212. The *McDougall* court stated that "a police officer is presumptively cooperative within the meaning of Rule 15.3 if the officer is willing to be interviewed by defense counsel between the hours of 8:00 a.m. and 6:00 p.m. Monday through Friday." *McDougall*, 155 Ariz. 186, 190-1.

If the police officer demands that the prosecution set up the interview, then the officer is **not** giving defense counsel a time between the hours of 8:00 a.m. and 6:00 p.m. Monday through Friday, when he will be available for an interview. He is violating the spirit and intent of the *McDougall* case, and should be deemed uncooperative. Defense counsel **does not** have to wait until such time as the state decides to set up the interview. There is nothing improper in a police officer, or any other witness, requesting the presence of the prosecuting attorney; however, if that witness refuses to give dates and times when he would be available for an interview, he should be deemed uncooperative and subject to a deposition under Rule 15.3. If the witness wants the prosecutor present, it is his obligation to arrange for the prosecutor to attend the interview.

If the court does grant a request for deposition, please note that opposing counsel must have notice of the deposition. If the state has proper notice of the deposition, and the prosecutor fails to appear, you may proceed with the deposition. Your client also has the right to attend any deposition that is set. Neither party may attempt to preclude opposing counsel from attending the deposition. *Montgomery Elevator Company v. Superior Court*, 135 Ariz. 432, 661 P.2d 1133 (1983). In *Murphy v. Superior Court in and for Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984), the Supreme Court of Arizona discusses when the defense may move to compel an individual to be deposed. The Victims' Bill of Rights was passed after the *Murphy* decision, and that decision would no longer apply to alleged victims.

Myth #6: The State May Interrupt Defense Counsel And Ask Questions During Any Portion Of The Defense Interview

The purpose of defense counsel requesting an interview on behalf of her client is investigation. Fully investigating the case does not call for interruptions by the prosecutor. They also have the opportunity to request an interview of any listed witness and may do so.

Defense counsel's interview is not the state's opportunity to attempt to rehabilitate a witness they may have listed. The interview time was requested by the defense and the state should not interfere in this process. On the other hand, if the defense attends an interview arranged by the state, defense counsel should give the same courtesy to the prosecution and not interrupt during the interview.

The prosecutor is not counsel for any witness, including the alleged victim of a crime. If the alleged victim agrees to

an interview, while the state may advise an alleged victim of her rights prior to the interview, it does not have the right to control what the alleged victim tells defense counsel.

In *State v. Chaney*, 5 Ariz. App. 530, 420 P.2d 1004 (1967), the court held that "it is inconsistent with the role of the prosecuting attorney to discourage witnesses from talking with defense counsel". 5 Ariz. App. 530, 535. In *Mota v. Buchanan*, 26 Ariz. App. 246, 547 P.2d 517 (1976), the prosecution claimed that the police were not independent witnesses but rather "the prosecutor's partners in the fight against crime and criminals." The *Mota* court rejected that contention and held that a witness is not the exclusive property of either the prosecution or the defendant.

"We are of the view that, in the absence of an affirmative and convincing showing of exceptional circumstances or compelling reasons, a district attorney may not interfere with the pre-trial interrogation by a defense counsel of persons who may be called upon as witnesses in the case...The district attorney may not interfere with or impose his preference or judgment on the defendant . . . A public prosecutor is entrusted with an awesome duty which requires him to serve the interests of justice in every case. For this reason, a witness who may have information which is favorable to the defense must be made available to the defense." (original emphasis) *Id.* at 249.

The court in *Mota* held that the state may not interfere with either the defendant's access to witnesses or the interview process, stating:

"Unquestionably, we cannot force a district attorney to approve of such questioning; however, we may certainly bar him from communicating his disapproval to the witness." *Id.* at 249.

Myth #7: If I Have Tape-Recorded An Interview Of A Listed Witness By The State, I Must Then Turn Over That Tape Recording Immediately To The Prosecution

The state is required to disclose its witnesses within 20 days after the arraignment. The state generally lists any and all individuals who are mentioned in any police report, grand jury proceeding, preliminary hearing, or any other discovery material. The defense often files a notice of defenses stating that the defense may call any and all witnesses listed by the state. If the defendant has filed such a Notice of Defenses, then the state would be entitled to receive any tape-recorded or written statements by any listed witness, since the defense has adopted the state's witness list.

There are certain affirmative defenses that must be alleged by the defense if it intends to raise them at trial. Affirmative defenses include consent (where there is an allegation of forced sexual conduct), alibi, insanity, or mistaken identification. Usually, the listed state's witnesses will not aid the defense in establishing an affirmative defense. It may be true, however, that some of the state's witnesses may impeach the credibility of other state's witnesses. This is not the same as utilizing listed state's witnesses for the purpose of establishing affirmative defenses. Therefore, it is not necessary to list in the Notice of Defenses all of the state's witnesses.

(cont. on pg. 5)

The defendant's Notice of Defenses should only list all witnesses that the defense intends to call at trial to prove its case. The accused may also set forth in the Notice of Defenses that it retains the right to call any listed state's witness for impeachment purposes only. If this modified Notice of Defenses is filed, then the defendant is not obligated to give the state any tape-recorded or written statement of a listed prosecution witness, if the defense is not also listing that witness to prove one of their affirmative defenses.

In *Osborne v. Superior Court*, 157 Ariz. 2, 754 P.2d 331 (1988), the Court of Appeals held that the disclosure of prior statements used for impeachment purposes is governed by Rule 613(a) of the Arizona Rules of Evidence.

"If petitioner determines to use prior statements to impeach a prosecution witness, the prosecutor must be given an opportunity at that time to review the statement in question, and any issue as to the accuracy of the statement or whether it has been taken out of context can be resolved at that point. The mere possibility that such statements may be used and may be inaccurate or taken out of context does not justify a blanket order requiring disclosure of all statements not otherwise covered by Rule 15.2." (emphasis added) Id. at 5.

The prior tape-recorded or written statement of a prosecution witness, which is used only for impeachment, need not be disclosed until the defense actually attempts to impeach the state's witness with that prior recorded statement. Otherwise, the defense is not obligated to provide the statement to the prosecution.

If there is a listed state's witness that will prove one of the affirmative defenses noticed by the defense, then he should be listed as a defense witness, and any recorded statements taken from him should be turned over to the prosecutor.

Myth #8: It Really Doesn't Matter If I Turn Over All Of My Tape-Recorded Statements To The State, Nor Does It Matter That The State Sets Up The Interviews

A police officer gathers information in a case armed with the knowledge that the witnesses she interviews will be on the defensive. A police officer may offer her personal thoughts regarding the reactions of a particular witness or suspect, which may enhance or diminish the witness's credibility in front of a jury. Defense counsel has the same opportunity by conducting interviews on his own. This is especially true when defense counsel brings an investigator along to observe and note how a witness reacts during the interview process.

Whenever possible, go to the homes or work sites of civilian witnesses, to not only obtain a better interview, but also to possibly obtain new information relevant to the case from other potential witnesses.

Showing up on a potential witness's doorstep, whether it be at work or at his home, is probably the single best way to obtain the truth. The witness does not have the luxury of sitting in the comfort of the county attorney's office, believing that individual is his attorney, and that he can act in a more cautious manner in approaching the interview. This individual is face-to-face with the microphone, and being asked questions about the incident. A witness who shows obvious signs of nervousness, or takes long pauses between

answers, or must consult with someone else prior to giving certain answers, often loses credibility in front of a jury. Even his refusal to grant an interview at that time may be used to impeach his credibility at trial. Jurors would certainly stop and wonder why an individual would refuse to be interviewed. What does he have to hide?

One of the standard jury instructions provides that the manner of a witness while testifying may be taken into account by the jury. His manner while discussing any aspect of the case prior to the trial is also relevant. Most jurors want to know why alleged victims do not want to talk to the defense, and they also want to know why witnesses have been uncooperative. This raises questions regarding the witness's credibility in the minds of the jurors. It often is the difference between your client being successful or unsuccessful at a trial.

Police officers often feel most relaxed in their own police station. They are more congenial and more willing to talk to defense counsel without worrying what the prosecutor may think about their comments. Police officers are very candid in assessing a case, when they have this opportunity to express their thoughts in a one-on-one interview. Furthermore, if a police officer tape-records the interview, this may again be brought out at trial, especially if the police did not tape-record statements purportedly made by your client. Jurors will wonder why the police thought it was necessary for their thoughts to be tape-recorded, but did not feel it important enough to tape-record the defendant's statement, especially when the defendant was facing criminal charges. A police officer may, however, insist on the interview taking place at the police station and this would not be considered uncooperative under the *McDougall* holding.

Often police officers insist that interviews be conducted at the police sub-station. It may seem like too much work to go to the police station to conduct the interview. In many cases neither the state nor the defense have all of the police reports, including supplements, for a particular case. If you are conducting the interview at the police station, you may determine how many supplements were written to a particular report. It is a very simple process to have the police officer run off a copy of the supplements you do not have. Often these supplements contain exculpatory information, or list witnesses that lead to exculpatory information. Additionally, there may be related departmental reports, photographs, field interrogation cards, etc.

Interviewing witnesses who live at or near the scene of the alleged crime allows you to view the scene as it relates to the witnesses' statements. You also, often, uncover new witnesses. (I have literally had new witnesses walk up to me at the scene and tell me they have relevant information.)

Disclosing tape-recorded statements of a listed state's witness (not listed by the defense) should only be done if you believe the state will offer a better plea. It is a distinct advantage at trial to have in your possession impeachment evidence of which the state is not aware. There usually is no reason to give up such an advantage at trial.

(cont. on pg. 6)

Myth #9: If A Witness Is Not Listed On The State's List, And He Refuses To Be Interviewed, I Have No Options Prior To Having Him Testify At Trial

Rule 15.3(a)(2) provides that when: a "party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, ...and that she will not cooperate in granting a personal interview" then she may be subject to a deposition. There is no requirement that the person be listed as a witness prior to requesting that this individual's deposition be taken. You must first ask the person if she is willing to consent to a voluntary interview. If she refuses to speak to you, and you have a good faith belief that she has information relevant to the defense of your client, then you may proceed to request the court order her deposition. If the court grants the deposition, and you learn during the deposition process that this person has relevant information, you should then list the individual as a witness to the trial. You are not required to list that person as a witness until you have actually had the opportunity to interview her. However, if you are close to the deadline for filing a list of witnesses, as a precautionary note you may want to list her prior to the deposition.

Myth #10: It Really Does Not Matter Who Does The Interviews, It Is Simply Easier To Allow My Investigator To Conduct The Investigation Of This Case

Having an investigator assigned to a case, and making her an integral part in the investigation of any case, is often essential. However, the assigned attorney should conduct the interviews of primary witnesses personally. I have had the opportunity to talk with many of the fine investigators associated with our office over time, and the consensus is that they would prefer the attorneys to do the interviews, especially when they involve major witnesses. This is not a comment on the ability of the investigator to conduct the interview; however, as the attorney you should have a theory of the case in mind, and all questioning of any witness should be tailored to fit into your theory of the defense.

Taking your investigator along on some of the critical interviews is an excellent idea. The investigator is not only there for impeachment purposes, even if the interview is being tape-recorded, but he or she may also comment on the emotional state of the witness at the time of interview, how the witness reacts to questions, etc. The investigator may take the stand at trial and talk about a particularly nervous witness, or a witness who was being evasive. I recently tried a case in which one eye-witness to the incident was visibly nervous upon our arrival at his home, unannounced, and he proceeded to make a series of phone calls before he agreed to an interview. These facts were presented to the jury, through the testimony of the assigned investigator, and considerably lessened the credibility of that witness. Another eye-witness in the same case stated under oath that he had not been attempting to avoid being interviewed by our office, and that he had only received one card from our office, left on his door, and he had lost the card. The investigator took the stand and testified that he had made several stops at that house and had left both letters and cards on numerous occasions. The credibility of that witness was greatly diminished in the minds of the jurors.

In conclusion, do not accept what you are told about the interview process at face value. Review the cases cited in this article to obtain a better understanding of what your options are in the interview process. You will not be frustrated because the state is slow in setting up the interviews because you may do it yourself.

The purpose of this article is to give helpful hints on how to approach the interview process. It is not only the correct way to investigate a case, but it does insure that your client will be given the very best defense. ^

**"Simulated Deadly Weapon":
When Your Armed Robber Wasn't Armed
By Donna Elm**

Times change and crimes change. Can you imagine a century ago a wild-eyed desperado demanding all the bank's gold by using his hand held like a gun under his chaps? But it is commonplace in the 1990's. Our modern Armed Robbery statute takes that into account. It criminalizes taking property by use of or threat to use a "simulated deadly weapon."

I. Definition of "Simulated Deadly Weapon"

What is a "simulated deadly weapon"? The court of appeals ventured to define it in *State v. Felix*, 153 Ariz. 417, 737 P.2d 393 (App. 1986). It noted that the "deadly weapon" part is defined in A.R.S. §13-105(10) as "anything designed for lethal use. The term includes a firearm." *Id.* at 419, 737 P.2d at 395. The court then adopted the definition of "simulated" given in the American Heritage Dictionary: "1. To have or take on the appearance, form, or sound of; imitate. 2. To make a pretense of; feign ..." *Id.* For example, when a robber poked a nasal inhaler into the cashier's ribs as if it were a weapon during the robbery, he used a "simulated deadly weapon." *Id.* Other types of "simulated deadly weapons" include a stick shaped like a gun barrel, a toy gun, or a real gun that is rendered permanently inoperable.

II. The Hand as a "Simulated Deadly Weapon"

A robber's hand, too, may be a "simulated deadly weapon." See *State v. Franklin*, 130 Ariz. 291, 635 P.2d 1213 (1981). However, a careful study of the case law reveals that a hand is only a "simulated deadly weapon" when it is shaped and held so as to look like a deadly weapon. In grappling with this issue, the Arizona Supreme Court held that "a weapon, whether it be an actual deadly weapon, a dangerous instrument or a simulated deadly weapon, must actually be present" to support a conviction of Armed Robbery. *State v. Garza Rodriguez*, 164 Ariz. 107, 112, 791 P.2d 633, 638 (1990). The simulation required "is not that a robber feigns or pretends to have a weapon on their person but rather that the person commits the robbery with a pretend deadly weapon." *Id.* (cited in *Bousley* at 4). Hence, a hand only becomes a "simulated deadly weapon" if the robber makes it look like a deadly weapon. (cont. on pg. 7)

There is a distinction between simulating and merely pretending to have a deadly weapon. When a robber makes his hand look like a concealed gun, it is a "simulated deadly weapon." In *Bousley*, Bousley and Ellison held their hands under their clothing so that they appeared to have handguns in their pockets. *Id.* at 3, 4; and see *State v. Ellison*, 169 Ariz. 424, 425, 819 P.2d 1010, 1011 (Ct.App. 1991), *rev'd and aff'd* in *Bousley*. These men "did more than simply imply that they had guns. They committed the robberies by positioning their hands to make their hands appear as if they instead were deadly weapons." *Ellison* at 427, 819 P.2d at 1013.

On the other hand, when a robber threatens or implies he has a gun but never displays the concealed hand like one, then it is not a "simulated deadly weapon." In *Garza Rodriguez*, the robber said she would "shoot the smile off" the disbelieving clerk's face, then shuffled a hand back and forth under her serape, apparently without making it look like a gun. *Garza Rodriguez* at 108, 791 P.2d at 634. The supreme court held that this robbery lacked the crucial "actual presence" of a "simulated deadly weapon." *Id.* at 112, 791 P.2d at 638. Thus a merely concealed hand, even when moved suggestively, does not constitute a "simulated deadly weapon" unless it is displayed to look like a weapon.

Arizona's Armed Robbery statute is analogous to Michigan's, *Ellison*, 169 Ariz. at 427, 819 P.2d at 1013, so we may rely on case law from that jurisdiction, too. In *People v. Jury*, 3 Mich. App. 427, 142 N.W.2d 910 (1966), the robber positioned his covered hand as though he held a gun. This constituted an armed robbery. In *People v. Burden*, 141 Mich. App. 160, 366 N.W.2d 23 (1985), the robber "held his hand in his pocket in such a way that it was believed that he had a gun." *Id.* at 165, 366 N.W.2d at 26. When a concealed hand is "held in such a manner as to resemble a pistol," then the offense is an armed robbery. *Id.*

On the other hand, when the robber merely had his hand underneath his coat, but never made it bulge like a weapon, resemble a weapon, or take the shape of a weapon, it is not an armed robbery. *People v. Saenz*, 411 Mich. 454, 307 N.W.2d 675 (1981). Similarly, just threatening to use a deadly weapon without displaying anything is insufficient. *People v. Parker*, 417 Mich. 556, 565-66, 339 N.W.2d 455, 459-60 (1983).

"It is not enough that the person assaulted is put in fear; a person who is subjected to an unarmed robbery may be put in fear."

To constitute armed robbery, the robber must be armed with an article which is in fact a dangerous weapon -- a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon.

Words or threats alone can never be dangerous weapons because the statute is concerned with weapons, not words."

Id. at 565, 339 N.W.2d at 459. Arizona's Armed Robbery statute, like Michigan's, is concerned with weapons, real or simulated, so "actual presence" of the hand shaped like a weapon is necessary to make a hand constitute "simulated deadly weapon."

III. Threatening to Use a "Simulated Deadly Weapon"

The Armed Robbery statute also criminalizes threatening to use a deadly weapon or "simulated deadly weapon." What constitutes threatening to use a "simulated deadly weapon"? It is not mere threats.

In *Garza Rodriguez*, the supreme court interpreted the meaning of "threaten to use" a simulated deadly weapon in the context of the Armed Robbery statute. See 164 Ariz. at 109, 791 P.2d at 635. The court noted that mere threats, without the presence of any weapon (actual or simulated), constitute no more than a simple robbery. *Id.* (citing *State v. Bishop*, 144 Ariz. 521, 698 P.2d 1240 (1985), and *State v. Yarbrough*, 131 Ariz. 70, 73, 638 P.2d 737, 740 (App. 1981)). For mere threat to be elevated to armed robbery, "something even more in the way of dangerousness is needed." *Id.* That "something more" is a weapon (a deadly or "simulated deadly weapon") that must actually be present and used in a threatening manner. *Id.* (citing *State v. Moriarty*, 107 Wis.2d 622, 321 N.W.2d 324, 329 (App. 1982)). Therefore, "a mere verbal threat to use a deadly weapon, unaccompanied by the actual presence of a deadly weapon, dangerous instrument or simulated deadly weapon, does not satisfy the statutory requirement for a charge of armed robbery." *Id.*

IV. Conclusion

Times change and crimes change. A century ago, the desperado with his hand under his chaps would never have lived long enough to have needed our services. Frontier justice, Arizona style. In the 1990's, however, we have an opportunity to limit the punishment our clients receive. When your robber wasn't armed, try to reduce the charges to a simple robbery or even theft through Motions to Remand, Motions to Dismiss or Amend the Complaint, Directed Verdicts, or Lesser-Included Jury Instructions. ^

New DUI Law

By Gary Kula

On April 22, 1993, Governor Symington signed into law Senate Bill 1003 which modified the laws for the offense of Driving While Under the Influence. Unless otherwise noted, these changes become effective on July 17, 1993.

Alcohol Screening For Juvenile Offenders

Juveniles convicted of DUI may now have their alcohol abuse screening completed by a county probation department. (A.R.S. §8-232(F)). The statute was amended during last years' legislative session to allow adult DUI offenders to have their alcohol screening completed through county probation departments. (A.R.S. §28-692.01(A)).

(cont. on pg. 8)

Home Detention

DUI offenders are now eligible for placement in a home detention program. A home detention program may either be set up through a city or town (A.R.S. §9-499.07) or through a county sheriff's department (A.R.S. §11-459). Unfortunately, there are no home detention programs in place at this time for DUI offenders. Should such programs become available, a follow-up article will be written with information on the rules, regulations, and eligibility requirements of the home detention programs.

Probation

A person convicted for a violation of Section 28-692 may now be placed on probation for up to five years. (A.R.S. §13-902(B)(1)). A person convicted of violating Section 28-697 (felony DUI) may now be sentenced to probation for up to ten years. (A.R.S. §13-902(B)(2)).

As of October 1, 1994, and thereafter, if a person is placed on probation for violating A.R.S. §28-692, the probation shall be supervised unless the court finds that supervised probation is not necessary or the court does not have supervisory probation services. (A.R.S. §28-692.01(L)).

Revoked and Suspended Driving Privileges

A.R.S. §28-476 has been repealed. This statute attempted, in part, to establish that the offenses of driving on a suspended or revoked license could occur anywhere throughout the state.

Affirmative Defense

The only substantive change to the DUI statute was the deletion of the reference to blood within the affirmative defense. With the changes in the wording of the affirmative defense, the state is no longer specifically required to prove beyond a reasonable doubt that a person's blood alcohol content was 0.10 or more at the time of driving following the presentation of some credible evidence of the affirmative defense.

DUI Penalties (First Timers)

A DUI first timer (first offense or only offense within five years) shall be sentenced to serve not less than ten consecutive days in jail. The judge may at the time of sentencing suspend all but 24 consecutive hours of the sentence if the person completes a court-ordered alcohol or drug screening, counseling, education and treatment program. If the person fails to complete the court-ordered screening, counseling, treatment and education, and has not been placed on probation, the court shall issue an order to show cause as to why the remaining jail sentence should not be served. (A.R.S. §28-692.01(B)).

DUI Penalties (Second Offense)

A person convicted of a second DUI offense within a five-year period shall be sentenced to serve not less than 90 days in jail, 30 days of which shall be served consecutively.

The judge may at the time of sentencing suspend all but 30 days of this sentence if the person completes a court-ordered alcohol or drug screening, counseling, education and treatment program. If the person fails to complete the court-ordered screening, counseling, education and treatment, and has not been placed on probation, the court shall issue an order to show cause why the remaining jail sentence should not be served. (A.R.S. §28-692.01(E)).

Treatment Alternative Sentencing

The treatment alternative for DUI offenders has been eliminated. This alternative had allowed a judge to place a person on probation and require attendance at a court-approved alcohol abuse self-help program for a consecutive six-month period. At the end of the probationary period, the conviction would then be set aside pursuant to A.R.S. §13-907. It is just as well that this alternative is gone as no one ever used it, it really did not benefit anyone, and it really never made much sense.

Community Services Hours

The court may now order a DUI offender to perform up to 40 hours of community service. Previously, no more than 25 hours of community service could be ordered. (A.R.S. §28-692.01(C)).

Work Furlough and Work Release

A first-time DUI offender must serve 24 consecutive hours in jail before being placed in a work program. A second-time DUI offender must still serve 48 consecutive hours in jail before being placed in a work program. A person participating in a work program may now only be released five days per week for employment or studies.

Felony DUI

A felony DUI is now a class 4 felony.

A. A person convicted of a DUI offense which became a felony because of the status of his driving privileges or because he had two prior DUI convictions within a five-year period shall now be sentenced to serve not less than four months in prison. (A.R.S. §28-697(E)). If this person fails to complete the term of probation which requires alcohol or drug screening, counseling, education, or treatment, he may be incarcerated for an additional period of not more than four months with the total period of incarceration not exceeding one year. (A.R.S. §28-697(G)(1)). In the event this person's probation is revoked and he is sentenced to prison, the time spent in custody under the original sentence and any time spent in custody because of a failure to complete alcohol or drug treatment shall not be credited towards the final prison sentence imposed. (A.R.S. §28-697(H)).

(cont. on pg. 9)

B. If a person is convicted of felony DUI for having two prior DUI convictions within a five-year period (A.R.S. §28-697(A)(2)) and the person actually had three or more prior DUI convictions within that five-year period, then that person shall be sentenced to a prison term of not less than eight months. (A.R.S. §28-697(F)). If this person fails to complete the court-ordered term of probation as to alcohol or drug screening, counseling, education or treatment, he may be incarcerated for an additional period of not more than eight months for a total period of incarceration of not more than two years. (A.R.S. §28-697(G)(2)). In the event this person's probation is revoked and he is sentenced to prison, the time spent in custody under the original sentence and any time spent in custody because of a failure to complete alcohol or drug treatment shall not be credited towards the final prison sentence imposed. (A.R.S. §28-697(H)).

Costs of Emergency Response

A person convicted of DUI may be responsible for emergency response costs in an amount not to exceed \$1,000.00 for a single accident. If an emergency response is necessary, this assessment may be made against those who are convicted of being under the influence while driving a motor vehicle (A.R.S. §28-692 or A.R.S. §28-697), flying an aircraft under the influence (A.R.S. §28-1744 or A.R.S. §28-1750), or operating a water craft or water skis under the influence (A.R.S. §5-342) where their negligent actions were proximately caused by being under the influence.

The purpose of this article is to provide you with an outline of the major changes to the DUI laws. For a copy of Senate Bill 1003, please contact the Training Division of our office or call the Secretary of State's Office at 542-4086. ^

Slope Detectors and Mouth Alcohol

By Gary Kula

We have all heard the criminalist in DUI cases sing the praises of the slope detector which can be found on the Intoxilyzer 5000. Most criminalists have been saying that while not infallible, the slope detector is an effective means of protecting against the presence of mouth alcohol. This claim is usually made in response to our defense that mouth alcohol unfairly and disproportionately raised our client's BAC test result. To discredit the reliability of the slope detector, you should use a study which was published in the Journal of Forensic Sciences. In this study, which examined the retention of mouth alcohol in dentures, it was found that slope detectors are far from foolproof. In fact, the study stated:

"Our experience with the Intoxilyzer 5000 has shown that its residual mouth alcohol flagging program (that is the slope detector) is not entirely reliable under the extreme experimental conditions employed in the present study. In this experiment we were able to obtain a parent BrAC's as high as 0.18g/210 L in spite of this feature. The slope detector was never intended to be a substitute for residual mouth alcohol detection and

prevention protocol such as pretest alcohol deprivation period and requiring agreement within 0.02g/210 L for successive BrAC's taken two to ten minutes apart."

(Journal of Forensic Sciences, vol. 37, number 4, July 1992, page 999 at 1006.)

It does not say much for the slope detector that these researchers were able to obtain readings up to 0.18 BAC solely from mouth alcohol despite the presence of the slope detector on the Intoxilyzer 5000. For a copy of the study, check your local law library or contact the Training Division of our office. ^

Editor's Note: -- CORRECTION -- In the April newsletter, there was a discussion as to the necessity of an additional waiting period following an Intoxilyzer 5000 printout of "Invalid Sample." The article should have reflected that the printout in such a case would look like:

<u>TEST</u>	<u>BAC VALUE</u>	<u>TIME</u>
Air Blank	.000	01:14
INVALID SAMPLE	.XXX	01:15
Air Blank	.000	01:16

Since last month's newsletter was printed, at least one superior court judge has agreed that the BAC test results should be suppressed where the operator failed to commence an additional waiting period following a printout of "Invalid Sample." ^

A Treatment Program That Pays

Contributed by Diane Terrible

Historically, treatment programs for female clients were virtually nonexistent. Now, TERROS has joined Purdue University in an effort to learn how to help women with substance abuse problems. They are conducting a research program with funding from the National Institute of Drug Abuse and **they are paying women who participate!**

PASA is an intensive treatment program that runs four days per week for eight weeks. Eligible candidates must meet the following criteria: (1) female, (2) between the ages of 18 and 50, (3) with a substance abuse problem, (4) involved in a committed relationship they want to maintain, and (5) having a partner (of either gender) who is willing to participate also. The program starts with "Pre-PASA" which meets once a week for two hours. Pre-PASA is a combination of orientation, an introduction to treatment, and a waiting period for entry into the core program. Pre-PASA may run for several weeks.

(cont. on pg. 10)

Along with Pre-PASA, and as part of the research process, women are selected randomly and placed into one of three groups. One-third of the women will participate in PASA only. One-third will attend individual sessions. The remaining one-third will attend couples' counseling. Individual sessions and couples' counseling will be held once a week for 12 weeks in conjunction with Pre-PASA and PASA. Program staff will conduct five assessments of the participants during different phases of treatment. For each assessment, the woman will be paid \$40-50.

Additional information is available by contacting Mac, Al or Kay at TERROS (995-1486) or by contacting Purdue's Project Coordinator, Teresa Stensrud, M.A. at A.S.U. (965-5434).

Practice Points

Disqualification Motions

Practitioners should be aware of developments that may assist in determining whether conflicts of interest exist. First, the ABA Model Rules of Professional Conduct (1983), adopted by Arizona, explicitly reject the appearance-of-impropriety standard. They do so in the specific context of the rule dealing with imputed conflicts. *Compare Rodriguez v. State*, 129 Ariz. 67, 628 P.2d 950 (1981) (a pre-code case).

Second, although there is some acceptance in criminal representation of "screening" lawyers in conflict of interest cases, particularly in former client and imputed disqualification matters, there are cogent arguments against this remedy. Moreover, "screening" has specifically been rejected by the Arizona State Bar as a way for public defenders to cure a conflict of interest, and the office is considered a "firm" for purposes of ER 1.10 (*See Opinion 89-08* (October 19, 1989)). Some commentators note that defense counsel's duty to represent clients requires thorough investigation that includes reviewing all information that may lead to impeachment or otherwise discredit witnesses. This would include reviewing former client files.

This argument relies upon a common sense approach that defense counsel must investigate on Sixth Amendment grounds, and that in order to determine whether a conflict exists, she must have determined that there is information (confidences or secrets) that would be used to the detriment of a former client. The test is whether it is a "substantially related" matter in which the new client's interests are "materially adverse" to the former client. If any confidences or secrets of the former client will be revealed, counsel should seek to withdraw or risk disloyalty to a previous client.

Third, an exception in the last sentence of ER 1.9(b) permits attorneys to use information relating to a former client that is in the "public domain," although there are some jurisdictions that hold otherwise. Also, former clients may waive a conflict; however, informed consent should include providing the former client with adequate information about the risks and advantages of a waiver (consultation on waiver should be conducted privately to protect the confidences or secrets).

Lastly, the duty of loyalty to clients is always an important consideration. Disqualification motions are based upon the attorney-client privilege and are fundamental to our profession. Notwithstanding the intent by the court to lessen conflict of interest merely on the "appearance of impropriety" standard, error on the side of protecting former clients' confidential communications is preferable to any situation where a client is betrayed. However, whether confidences or secrets will be revealed may usually only be ascertained by investigating the former client's file and being able to avow (or articulate under seal) that a conflict of interest exists.

CJ^

Arizona Advance Reports

Volume 133

Romley v. Superior Court
133 Ariz. Adv. Rep. 38 (Div. I, 2/18/93)

A juvenile was charged with six counts of aggravated assault, arising out of an incident where the juvenile allegedly fired a number of shots at a truck full of people. One bullet struck a passenger. The state filed a request to transfer the juvenile to adult court. The judge ordered the juvenile transferred only as to the count of firing the bullet which struck the passenger. The juvenile court retained jurisdiction over the remaining counts. The state moved to dismiss without prejudice the five counts that remained, in order to refile the charges in adult court where the defendant would be prosecuted on the first count. The juvenile court denied the motion to dismiss, and a special action was filed.

The juvenile court erred in not transferring all charges for adult prosecution. The general policy in Arizona is that joinder of crimes based upon the same conduct is permissible when such is not prejudicial to the defendant. To allow simultaneous actions in adult criminal and juvenile court would unduly burden both the courts and the parties. The juvenile court may not fragment the criminal transaction by retaining jurisdiction over some of the charges. It must transfer all charges. Special action relief is granted.

[Amicus Curiae represented by David A. Katz and Ellen E. Katz, MCPD.]

State v. Oatley
133 Ariz. Adv. Rep. 43 (Div. I, 2/18/93)

Defendant was indicted for possession of marijuana, a class 6 felony. Defendant pled guilty to possession of marijuana, a class 1 misdemeanor. The agreement provided for probation, \$750.00 fine plus the 40% surcharge. At sentencing, the trial court stated it intended to waive the surcharge and denied the state's request to withdraw from the agreement. The trial court fined defendant \$750.00, but did not impose the surcharge due to defendant's financial straits.

(cont. on pg. 11)

The state contends on appeal that the trial court unlawfully modified the terms of the agreement over the state's objection. Once the parties reach an agreement and the trial court accepts it, the trial court may not change the terms without giving both the state and defendant an opportunity to withdraw. *State v. Superior Court*, 125 Ariz. 575, 611 P.2d 928 (1980). While the trial court may waive all or any part of the penalty if it finds the payment would work a hardship on defendant or defendant's immediate family (A.R.S. §41-2403(C)), the trial court is not allowed to modify the agreement without the consent of both parties. The case is remanded.

[Represented on appeal by Helene F. Abrams, MCPD.]

State v. Wilson

133 Ariz. Adv. Rep. 44 (Div. I, 2/18/93)

Defendant entered into a probation violation agreement on October 27, 1992. Pursuant to A.R.S. §13-4033(B) and Rule 27.8(e), defendant is no longer entitled to a direct appeal from a plea agreement or probation violation agreement.

Defendant argues that the statute violates art. 2, §24 of the Arizona Constitution which gives defendants "the right to appeal in all cases." While the practice of requiring defendants to waive their right of appeal to avail themselves of the state's plea offer may be disagreeable, it does not violate the Arizona Constitution, and the defendant has recourse pursuant to Rule 32. A defendant may waive constitutional rights to avail oneself of the benefits of a plea offer, provided the waiver is an intentional relinquishment or abandonment of a known right or privilege. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

If defendant's argument were correct, plea bargaining would not be permissible since the right to jury trial (art. 2, §23 of the Arizona Constitution) is waived any time a defendant enters into a plea agreement. Public policy does forbid the state from bargaining away a defendant's right of appeal and leaving the defendant with no further review. *State v. Ethington*, 121 Ariz. 572, 573, 592 P.2d 768, 769 (1979). However, the defendant could have insisted on a probation revocation hearing, and he still has the right to seek review by way of post-conviction relief.

[Represented on appeal by James H. Kemper, MCPD.]

State v. Harris

133 Ariz. Adv. Rep. 41 (Div. I, 2/18/93)

Defendant, a black male, was convicted of first degree murder and related charges by an all-white jury. He petitioned for post-conviction relief.

After voir dire, the prosecutor exercised two peremptory challenges to strike two prospective black jurors. The result was an all-white jury. Defense counsel did not object to the challenges until the day after the trial court impaneled the jury. Defendant argues that the procedural rule barring his *Batson* claim was not a "firmly established and regularly followed state practice" under *Ford v. Georgia*, 498 U.S. 411 (1991). A party who complains of an error in the jury selection process must object before the trial judge impanels the jury and excuses the venire. In the absence of such objection, a party waives his right to object to the composi-

tion of the jury. *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978). The rule announced in *State v. Arnett* is a firmly established and regularly followed state practice, satisfying *Ford v. Georgia*.

[Represented on post-conviction relief by Charles R. Krull, MCPD.]

State v. Groshong

133 Ariz. Adv. Rep. 60 (Div. II, 2/25/93)

Defendant was in an automobile accident which resulted in the death of the driver of another car. Defendant was allegedly intoxicated and was charged with manslaughter.

When the officer arrived at the scene, he asked the paramedics if they were going to draw blood for medical purposes. The paramedic told the officer "yes," and then handed the officer a vial of defendant's blood. The trial court suppressed the sample relying on *State v. Kemp*, 166 Ariz. 339, 802 P.2d 1038 (App. 1990) and *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986). The trial judge reasoned that although the sample was drawn for medical purposes by medical personnel, defendant had not been advised of his right to obtain a portion of the blood as required before arrest, *Kemp*, and after arrest, *Montano*. The state appealed. The trial court's ruling is incorrect because the earlier opinion in *Kemp* was vacated by the Supreme Court. The constitution does not require a pre-arrest suspect to be advised of the right to retain a sample of his blood when a sample is collected under A.R.S. §28-692(J).

At the hospital, defendant willingly gave two blood samples after the officer told defendant he was not under arrest, but read his *Miranda* rights as a precaution. The trial court suppressed the two samples since the samples were not drawn for medical purposes by medical personnel as required by A.R.S. §28-692(J), regardless of the defendant's consent. The suppression of the samples was error. The samples were not obtained under §28-692(J), but through defendant's valid consent.

Defendant cross-appealed the court's denial of his motion to dismiss for prosecutorial misconduct. After being informed that defendant would not produce his privileged medical records, the state obtained the records through a search warrant. The state denied intentionally violating defendant's rights and blamed it on a police officer serving the warrant when the prosecutor had asked only for a draft of a warrant. The trial court suppressed the records but denied the motion to dismiss.

The manner in which the records were obtained was highly improper and posed serious risks to defendant's Sixth Amendment right to counsel. However, the trial court did not abuse its discretion in denying the motion to dismiss. Suppression of the medical records adequately protected the defendant, and the state did not intend to violate the defendant's rights. ^

Editor's Note: A special thanks to Michelle Allen, James Lachemann, Colleen McNally, Elizabeth Melamed, and Pat Ramirez for their assistance in the preparation of the Arizona Advance Reports summaries for our April and May issues.

April Jury Trials

March 29

James A. Wilson: Client charged with aggravated assault and kidnapping (with priors). Trial before Judge D'Angelo ended April 05. Client found guilty. Prosecutor D. Patton.

March 30

Gary F. Forsyth: Client charged with aggravated assault. Trial before Judge Gerst ended March 31. Client found guilty. Prosecutor G. Thackeray.

Rena P. Glitsos: Client charged with robbery (with 2 priors). Investigator D. Erb. Trial before Judge Bolton ended April 01. Client found guilty of lesser-included offense, attempted robbery. Prosecutor A. Johnson.

April 01

Robert C. Billar: Client charged with DUI (with priors). Trial before Judge Jarrett ended April 12. Client found guilty. Prosecutor M. Wales.

Daphne Budge: Client charged with aggravated assault and kidnapping. Investigator P. Kasieta. Trial before Judge Ryan ended April 14. Client found **not guilty**. Prosecutor G. McCormick.

Peggy M. LeMoine: Client charged with DUI. Investigator M. Fusselman. Trial before Judge Howe ended April 06. Client found guilty. Prosecutor P. Hearn.

April 05

Randy F. Saria, Sr.: Client charged with burglary (3rd degree). Investigator A. Velasquez. Trial before Judge Hotham ended April 07. Client found **not guilty**. Prosecutor R. Hinz.

Roland J. Steinle: Client charged with aggravated assault, dangerous (class 3). Investigator G. Beatty. Trial before Commissioner Ventre ended April 09. Client found **not guilty**. Prosecutor J. Longoria.

April 06

John Taradash: Client charged with sale of narcotic drugs. Investigator N. Jones. Trial before Judge Schafer ended with a hung jury April 08. Prosecutor D. Schlittner.

April 07

Reginald L. Cooke: Client charged with DUI. Trial before Judge Schneider ended April 14. Client found guilty. Prosecutors M. Rand and J. Beene.

April 12

Daniel G. Sheperd: Client charged with burglary and theft. Trial before Judge Schwartz ended April 15. Client found guilty. Prosecutor M. Daiza.

Jeffrey L. Victor: Client charged with theft (class 3). Investigator N. Jones. Trial before Judge Hotham. Client found **not guilty** (20 minutes). Prosecutor L. Kane.

James A. Wilson: Client charged with child molestation (4 counts). Trial before Judge Dann ended April 25. Client found guilty. Prosecutor S. Novitsky.

April 15

Gregory T. Parzych: Client charged with two counts of aggravated DUI (class 5). Trial before Judge Sheldon ended April 19. Client found guilty. Prosecutor S. Wells.

April 19

Albert H. Duncan: Client charged with aggravated assault. Investigator H. Schwerin. Trial before Judge Schneider ended April 22. Client found **not guilty**. Prosecutor M. Daiza.

Dennis M. Farrell: Client charged with child molestation. Trial before Judge Anderson ended April 20 with case being dismissed with prejudice. Prosecutor J. Beatty.

Joseph A. Stazzone: Client charged with arson (dangerous) and 2 counts of aggravated assault (dangerous). Trial before Judge Brown ended April 26. Client found **not guilty** of charges, guilty of lesser-included offenses -- reckless burning (misdemeanor) and disorderly conduct (misdemeanor). Prosecutor S. Sherwin.

April 20

Gary J. Hochsprung: Client charged with sale of narcotic drugs. Trial before Judge Hall ended April 26. Client found guilty. Prosecutor J. Hinchcliffe.

Gregory T. Parzych: Client charged with two counts of aggravated DUI (class 5). Investigator G. Beatty. Trial before Judge Hendrix ended April 22. Client found guilty. Prosecutor S. Wells.

Ray P. Schumacher: Client charged with armed robbery. Investigator H. Jackson. Trial before Judge Schwartz ended April 26. Client found **not guilty**. Prosecutor D. Bash.

Daniel G. Sheperd: Client charged with aggravated assault. Trial before Commissioner Chornenky ended April 22. Client found guilty. Prosecutor R. Baldwin.

(cont. on pg. 13)

April 21

William Foreman: Client charged with sexual assault (6 counts) and kidnapping (1 count). Investigator D. Erb. Trial before Judge Schneider ended with a Rule 11 (during jury deliberation) April 23. Prosecutor D. Greer.

April 26

David E. Brauer: Client charged with armed robbery (dangerous) and theft. Trial before Judge Schneider ended April 29. Client found guilty. Prosecutor G. Thackeray.

April 27

James P. Cleary: Client charged with possession of narcotic drugs. Investigator H. Brown. Trial before Judge Hertzberg ended April 29. Client found guilty. Prosecutor D. Schumacher.

Donna L. Elm: Client charged with theft. Investigator B. Abernethy. Trial before Judge Ryan ended April 28. Client found **not guilty**. Prosecutor J. Grimley.

Lisa A. Gilels: Client charged with DUI. Trial before Judge Gerst ended April 28. Client found **not guilty**. Prosecutors J. Duarte and J. Beene.

Jeanne M. Steiner & Larry Grant: Client charged with burglary, 3rd degree (with priors and while on parole). Trial before Judge Seidel ended with a hung jury (6-not guilty; 2-guilty) on April 28. Prosecutor T. Duax.

April 28

David I. Goldberg: Client charged with aggravated DUI (8 priors). Investigator H. Jackson. Trial before Judge Brown ended April 30. Client found guilty. Prosecutor J. Burkholder.

April 29

Randy F. Saria, Sr.: Client charged with possession of narcotic drugs for sale and importing/transporting narcotic drugs. Investigator D. Erb. Trial before Judge Hall ended with a hung jury May 04. Prosecutor P. Sullivan. ^

Editor's Note: --CORRECTION-- Last month's issue incorrectly listed William Peterson as the attorney handling the March 08 trial ending in a "not guilty" verdict. The correct attorney's name is **Wesley Peterson**.

April Advocacy

Peggy Simpson, Client Services Coordinator: Client had three felony convictions and had been to D.O.C. He also had failed to complete substance abuse counseling while on probation. The presentence recommendation was for greater than the presumptive on a class 3 felony. CSC made referral to attorney for Indian Rehab. Client was screened and accepted into the program, and was sentenced to four years standard probation and eight months jail. Attorney: Constantino Flores.

Peggy Simpson, Client Services Coordinator: Case was referred pre-plea on sexual assault and dangerous crimes against children, class 2 felonies. Plea stipulated 5 to 15 years D.O.C. on one charge and lifetime probation on second charge. The presentence report recommended a presumptive term. CSC submitted reports, both pre-plea and presentence, focusing on development of mitigation. Client was sentenced to a mitigated term in D.O.C. Attorney: Tom Kibler. ^

Editor's Note: The following is an example of client advocacy and initiative by our Pretrial Services Division:

On March 31, Pretrial Services Officer Cindy Goodrow was contacted by a client whose claim caught Ms. Goodrow's attention. The client stated that he received his third DUI on September 28, 1992, and he was sentenced to three years probation with six months in DOC. Upon his release from DOC on March 29, 1993, he immediately was picked up by the Maricopa County Sheriff's Office on an indictment for another DUI. The client explained that this indictment was for the very same DUI on which he just had served six months.

Ms. Goodrow took the information provided by the client and researched his claim. After confirming the client's conviction, she located the indictment through AIS (formally DIS). She then ascertained that this indictment was issued on February 25, 1993, (while the client was in prison) for a DUI that occurred on September 28, 1992. Ms. Goodrow contacted the Chief Trial Deputy, Bob Guzik, and handed over everything to him for further action. By the following afternoon, the client was released and eventually all current charges were dismissed.

Ms. Goodrow noted her appreciation of having Mr. Guzik available as our "trouble shooter," and reflected her gratitude that she was able to quickly assist a client in distress. She commented, "There goes another satisfied client of the Public Defender's Office." ^

Personnel Profiles

On May 17, Amy Bagdol (formerly the lead secretary of Trial Group C) started in the new administrative coordinator position and will be an assistant to Rose Salamone. She now is located on the 10th floor of the Luhrs Building. Taz Swiecki is serving as acting lead secretary for Trial Group C until Amy's replacement is chosen.

Barbara Brown began employment as a legal secretary with our Trial Group C on May 10. Barbara, who completed ASU Computer Institute's personal computer and word processing program, comes to our office after working in her husband's law office for almost five years. Prior to that employment, Barbara was a service representative for U.S. West Communications for ten years.

Steve Gauna replaced Freddie Perches as office aide on April 26. Prior to joining our office, Steve worked part-time as a janitor for the Cartwright School District. Steve was assigned to Trial Group B, and office aide Martha Perches moved to Trial Group A.

Jo Ann Luksich started in Trial Group C as a legal secretary on May 24. Jo Ann was a customer relations representative for America West Airlines for two-and-a-half years. Other past employment includes secretarial work.

Jeff Van Norman will start as a law clerk in Group C on June 7. Jeff, who has a B.S. in Business from ASU and will receive his Juris Doctor this month from Whittier College School of Law (Los Angeles, California), has worked with us the past two summers: first as a pretrial service officer and then as one of Gary Kula's law school externs. Jeff is the brother of Kevin Van Norman of Group C.

Catherine Woodruff will begin as a legal secretary in a downtown trial group on June 01. Catherine received her AAS degree for Legal Secretary from Mesa Community College. Prior to coming to our office, she worked for a law firm in Mesa for approximately six years. ^

Telecommunication Devices for Deaf Persons (TDD)

By Diane Terribile

Our office recently purchased three portable TDD (Telecommunication Device for Deaf Persons) machines for communicating telephonically with the hearing-impaired. A TDD is a keyboard mechanism similar to a tele-typewriter. It is attached to a conventional telephone with an acoustical coupler. A TDD provides a simple method whereby two people can have a typed "conversation" over the telephone. Without TDD's, hearing-impaired clients cannot provide information or schedule appointments without the use of a third-party interpreter or relay service.

Now, hearing-impaired people can reach our office by several methods: (1) using an interpreter or relay service, (2) calling the office TDD number (506-1646), or (3) dialing to any other telephone which has a TDD connected to it. We encourage regular use of TDD's for communicating with hearing-impaired people, especially for conversations involving privileged communication. However, **it is important to determine the person's preferred method of communication and use it in all dealings with the individual.**

To ensure that incoming calls are monitored constantly, one machine is assigned permanently to the main reception area. The other two machines are available for use by staff at more convenient locations. Staff from downtown, Durango, and Mental Health may check out a machine by contacting the receptionist in Suite 6 of the Luhrs Central Building. Staff from Mesa may check out a machine by contacting the lead secretary in Trial Group C. Instructions for TDD operation are easy to follow and will be provided with the machine. ^

BULLETIN BOARD

Speakers Bureau

More requests by community groups for speakers were met recently by our office.

Cecil Ash attended Deer Valley Middle School's Career Day on April 22, where he spoke about the law as a career, the education requirements of an attorney, and the job opportunities and benefits for lawyers.

Bill Foreman, a new member of our Speakers Bureau, spoke on May 25 at Desert Valley Elementary School's National Junior Honor Society Induction (for 7th and 8th grade students and parents). He spoke on character, leadership, and community involvement.

Emmet Ronan will speak on "Overview of the Public Defender's Office" for Superior Court training at SEF on June 16.

Community Programs

On March 20, Reginald Cooke and Larry Grant participated in the annual "Know Your Rights" seminar sponsored by the NAACP.

On April 1, Michelle Allen and Reginald Cooke assisted in the mock DUI trial conducted at the Phoenix Police Academy. The trial resulted in a "Not Guilty" verdict.

The Young Lawyer Division of the State Bar of Arizona sponsored the "Minority High School Outreach Program" held on April 30. The Program Steering Committee included Reginald Cooke (Chairperson), Constantino Flores, and Genii Rogers. The Outreach Program started at 8:00 a.m. with a tour of Arizona courts and Capitol, continued with a session with various legislators, judges and attorneys, and concluded at 2:45 p.m. after a tour of county jails. 42 local students attended the program. ^